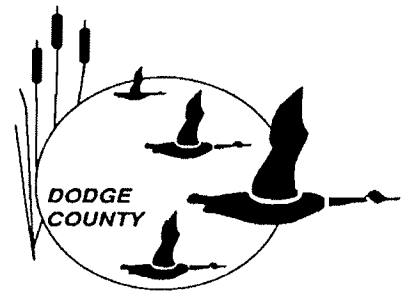


OFFICE OF THE DISTRICT ATTORNEY

Kurt F. Klomberg, District Attorney

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NO PROSECUTION MEMORANDUM

TO: Dodge County Sheriff's Department
Attention: Capt. Chad Enright

FROM: Kurt F. Klomberg
District Attorney

DATE: January 7, 2019

RE: State -vs- Troy R Kelm
Law Enforcement Complaint #17-20124
No Prosecution Notification

Introductory Statement

The Dodge County Sheriff's Office investigated a traffic crash occurring on August 17, 2017 in Dodge County. The crash resulted in the death of Kayla Davis after she was struck by a vehicle operated by Troy Kelm. The Sheriff's Office sent the case to the Dodge County District Attorney's Office under a "REVIEW SUFFICIENT" coversheet, requesting a review of charges against Kelm. "REVIEW SUFFICIENT," referrals are referrals where the police agency is indicating their opinion that no criminal charges should issue, but is asking for a review by the District Attorney. This memo is the result of the review process and describes the outcome. This review also includes and describes the second opinion on the case provided by the Wisconsin State Patrol and by the Wisconsin Department of Justice.

Layout and Attachments

This memo is 16 pages in length with page numbers appearing on the bottom portion of the page and beginning on the second page.

Attached to this memo are several reference documents – those are;

Dodge County Sheriff's Office "REVIEW SUFFICIENT" cover sheet. (1 page)

Assistant District Attorneys
Gilbert G. Thompson
Yolanda J. Tienstra
James T. Sempf

Managing Attorney
Robert G. Barrington

Victim/Witness Coordinators
Peggy Novak
Cayla Her

Dodge County Sheriff's Office Crash Reconstruction Report authored by Deputy Brian Severson (23 pages)

Wisconsin State Patrol Analysis Memorandum, dated October 8, 2018 and signed by Crash Reconstructionist Peter M. Moe and Crash Reconstructionist Jeremy VerGowe. (3 pages)

January 7, 2018 Letter from Wisconsin Traffic Resource Prosecutor, Assistant Attorney General Tara Jenswold concurring in the State's decision to not issue criminal charges against Troy Kelm. (2 pages)

Overview and Timeline

This incident occurs at approximately 5:16 am on August 17, 2017. The conditions included low light/darkness, intermittent precipitation, and wet roadways. At that approximate time, two vehicles were traveling in the northbound lanes of Highway 151 in the Town of Calamus, Dodge County, Wisconsin. These vehicles were a Toyota Corolla operated by Tyler Briesse and a Chevrolet Cruze operated by David Engelhardt. Engelhardt's vehicle was in the lead with Briesse approaching to pass. Briesse lost control of his vehicle and struck Engelhardt causing both vehicles to end up in the median between the lanes of travel and generally facing north.

Several passing motorists stopped to render aid to the crashed vehicles. Those people included, Nathan Lyman, Theresa Casey and Kayla Davis. Nathan Lyman had been traveling northbound and witnessed the Briesse/Engelhardt crash. Lyman pulled off the roadway and went to assist the crashed motorists. Theresa Casey had been traveling southbound and pulled her vehicle to the median shoulder and contacted 911. Kayla Davis, also traveling southbound some distance behind Casey, stopped her vehicle in the inside (fast) lane of the highway and exited her vehicle to enter the median.

While Davis was in the grass addressing David Engelhardt, Troy Kelm, who was traveling with a passenger, Brittany Odum, was approaching the scene of the crash in the southbound inside (fast) lane. According to Kelm, he was following another vehicle in the inside lane until the vehicle changed lanes to the outside (slow) lane. At the point that the vehicle changed lanes, Kelm observed Davis's vehicle parked in his lane of travel. Upon seeing Davis's parked vehicle, Kelm attempted to avoid a collision by steering his truck to the left and entering the median. Kelm maneuvered his truck between the Briesse/Engelhardt crash scene and the Davis and Casey parked vehicles. Unbeknownst to Kelm, this was the location where Davis was standing in the grass. While Kelm avoided hitting the various vehicles, he struck and killed Davis.

Kelm remained at the scene and contacted 911. Deputy Ryan Jackson was dispatched to the scene, along with other law enforcement and first responders. Deputy Brian Severson, a Dodge County crash investigator, was also dispatched to the scene. Deputy Severson and Deputy Jackson contacted Kelm as part of their initial investigation. During their initial interaction with Kelm, neither deputy reported that they noticed any indication of impairment. Pursuant to the standard crash investigation protocol at the Sheriff's Office, Deputy Severson asked Kelm to submit to a voluntary blood draw. Kelm declined, indicating that he had smoked marijuana the preceding night and did not want to do the blood draw. Kelm instead suggested to the Deputies that they should have him perform field sobriety tests.

Deputy Jackson had Kelm perform field sobriety tests, and at the conclusion of those tests, arrested Kelm for Operating While Intoxicated 1st Offense. Kelm was then taken for a blood draw under Wisconsin's Implied Consent Law, and cooperated fully with the testing procedure. Kelm also agreed to voluntarily submit to an examination by Watertown Police Officer and Drug Recognition Expert Jeffrey Meloy. After the examination, Officer Meloy rendered an opinion that Kelm was under the influence of a narcotic analgesic and should not be operating a motor vehicle.

The Sheriff's Office issued a First Offense OWI Citation with an initial appearance date of January 25, 2018. The blood sample was mailed to the Wisconsin State Lab of Hygiene. In the fall of 2017, the Sheriff's Office Crash Team made a determination that the crash causing the death of Davis, was not a criminal act and closed the crash investigation without a referral to the District Attorney.

The blood test result was received by the Sheriff's Office on December 26, 2017. The test revealed that Kelm had no delta-9 THC (the active and restricted metabolite of marijuana) no 11-hydroxy-THC (an inactive and non-restricted metabolite of THC) and a reportable level of Carboxy-THC (an inactive and non-restricted metabolite of THC). This result showed that Kelm was not under the influence of THC at the time of the crash and only had an inactive, non-impairing, metabolite of THC in his blood. Thus, Kelm could not be charged with a violation of Wisconsin's Operating With a Restricted Controlled Substance Law, as set forth in Wis. Stat. s. 346.63(1)(am). The blood test did reveal the presence of Methadone, Alprazolam and Clonazepam in Kelm's blood, which could support the Operating While Intoxicated (OWI) Citation already issued.

By January, 2018, the District Attorney had become aware that the Davis family was very confused about the First Offense OWI citation and the lack of any homicide charges. The First Offense OWI citation and its corresponding police reports, like all civil citations, were not sent to the District Attorney's Office until after Kelm entered his not guilty plea and had his initial appearance on January 25, 2018. According to electronic records, the file was received and opened in the District Attorney's Office on January 29, 2018. The District Attorney arranged a meeting with the Davis family and the Sheriff's Office Crash Team on January 31, 2018 to explain the situation.

During the January 31, 2018 meeting, the Davis family members expressed their dissatisfaction with the decision to not refer homicide charges and indicated that there were several witnesses that had not been interviewed or fully interviewed. At the end of the meeting, the Davis family was informed that the case would be re-opened for investigation based on their assertions that witnesses had not been contacted.

Over the next several months, the Sheriff's Office conducted follow up investigation, including re-interviewing witnesses who made statements during the initial investigation. The investigators also interviewed the one witness the family identified that had not been interviewed. Deputies also reviewed all commercial and industrial buildings from the location of the crash and north to Gunn Road to attempt to locate any usable video. Deputies also looked more closely at the weather and road conditions at the time of the crash, obtaining weather data showing the amount of storms and precipitation in the area at the time of the crash. Finally, deputies sought and obtained prescription drug documentation from Kelm.

After the subsequent investigation was completed by the Sheriff's Crash Team, the Sheriff's Office sent a "review sufficient" referral to the District Attorney's Office for Homicide by Intoxicated Use of a Vehicle. A "Review Sufficient," referral is a referral

that means the police agency is not referring charges as the agency believes no charges should issue, but is providing the file to the District Attorney for review only. The Review Sufficient referral was received in the District Attorney's Office on July 3, 2018. Due to the size of the file and the multiple places the Sheriff's Office had investigation materials stored, the transfer of the investigatory materials was not complete until late July, 2018.

Kelm was scheduled for a trial on August 8, 2018 to resolve the First Offense OWI charge. That trial was conducted on August 8, 2018 to a civil jury and the jury unanimously rendered a not guilty verdict after less than thirty minutes of deliberation. The only issue at the trial for the jury to determine was if Kelm was impaired at the time of his operation of the motor vehicle on August 18, 2017. The jury determined that there was insufficient proof of impairment to find Kelm had operated a motor vehicle under the influence of an intoxicant at the time of the crash.

Due to the Davis Family's concern about the Sheriff's Office original decision not to refer homicide charges to the District Attorney the case had been re-opened in January, 2018. In light of those expressed concerns, and having received a Review Sufficient referral from the Sheriff's Office after the re-opened investigation was completed, the District Attorney determined that a second opinion on the case was warranted. The District Attorney contacted the Wisconsin State Patrol Technical Reconstruction Unit and requested a review of the case. The Wisconsin State Patrol agreed to do a review and assigned two certified crash reconstructionists to the case.

On December 3, 2018 the State Patrol investigators met with the District Attorney and delivered their analysis of the case. After their own independent review of the case, the State Patrol's Reconstructionists reinforced the Sheriff's Office's original decision not to request charges.

Analysis

Homicide By Intoxicated Use of a Vehicle

Section 940.09(1)(a) makes it a felony crime to cause the death of another person while operating a vehicle under the influence of an intoxicant. Such a crime would need to be proved to a 12-person jury who would need to make a unanimous finding of guilt beyond a reasonable doubt. There are two obvious impediments to meeting this burden of proof in this case. First, the State is unable to prove beyond a reasonable doubt that Kelm was impaired at the time of the crash. The second issue is that even if the State could prove impairment, it would not be able to overcome the affirmative defense specifically provided for under the OWI Homicide statute. I will discuss both impediments separately in the following paragraphs.

Lack of Sufficient Proof of Impairment

Generally speaking, proof of impairment in an OWI case is established by a combination of at least three different types of evidence – officer observations of impairment (including SFSTs and statements by subject), chemical test results and

driving behavior. Prosecutors seek to prove impairment beyond a reasonable doubt through some combination of these types of evidence.

Officer Observations

Kelm was arrested after performing standardized field sobriety tests. However, it is important to understand that the deputies that had contact with him on the scene did not ask him to do field tests. Instead, Kelm offered to do the tests in lieu of a blood test. Typically in an OWI investigation, after a lawful contact, if an officer sees sufficient indicators of impairment rising to the level of reasonable suspicion, he/she may (and almost always does) request the subject to perform field tests. Reasonable Suspicion to believe someone is impaired is a very low threshold, requiring few indicators or observations of impairment. The deputies who spoke to Kelm on scene did not ask Kelm to perform the field sobriety tests. A reasonable inference drawn from this is that they did not observe the minimal indicia of impairment required to reasonably suspect that he was impaired. The deputies did not report that they made observations that led them to believe that the field sobriety tests were warranted. Instead it was Kelm who asked the deputies to administer the field sobriety tests.

The deputies did ask Kelm if he would submit to a voluntary blood draw, This request was based on departmental policy, and cannot be construed as an indication that deputies believed that Kelm was impaired at that time. Furthermore, Kelm's denial to do that voluntary blood test cannot be used against him, as a person cannot be penalized for asserting their Constitutional rights. Kelm, like everyone else under those circumstances, had a Constitutional right to refuse to take the blood test at that point. However, Kelm's response – his reason for refusing to take the blood test – i.e., that he smoked marijuana the night prior - could be used against him. Kelm's statement is subsequently corroborated by the blood test results, so the evidentiary value of this statement is greatly diminished.

At Kelm's suggestion, Deputy Jackson has Kelm do field tests. Standardized Field Sobriety Tests (SFST) are designed to help officers determine if a person is impaired. They include the Horizontal Gaze Nystagmus (HGN) test, the Walk and Turn (WAT) test and the One Leg Stand (OLS) test. In all of these tests, officers are looking for indicators of impairment, or clues. Deputy Jackson observed no clues (0/6) on the HGN test (4 or more clues can indicate impairment). He observed several clues on the WAT test (2 or more clues can indicate impairment). Deputy Jackson observed one, or possibly two clues, on the OLS test (2 or more clues can indicate impairment). Deputy Jackson asked Kelm to provide a field breath test (PBT) which resulted in a 0.00 result.

After the SFSTs were completed, Deputy Jackson asked Kelm to perform some additional field tests. The first was the lack of convergence test, which showed no indicators of impairment. The second was the Romberg Test, during which Kelm significantly misjudged the passage of time. Deputy Jackson did not make any other observations consistent with impairment during these tests. Based on his observations of Kelm during the field tests, Deputy Jackson arrested Kelm for Operation While Intoxicated first offense. Because Deputy Jackson had no reason to believe that Kelm was under the influence of alcohol, he requested that a Drug Recognition Expert be called in to further evaluate Kelm. Officer Jeff Meloy from the Watertown Police Department responded and performed an evaluation.

As part of the DRE evaluation, Officer Meloy also put Kelm through some SFSTs including WAT and OLS, and saw a similar number of clues as Deputy Jackson did earlier. Officer Meloy also had Kelm perform several other tests including the Finger to Nose test, which Kelm performed without difficulty and the Romberg test which Kelm performed much more successfully than he had for Deputy Jackson. Kelm's pulse was in the normal range. Officer Meloy noted some restriction in Kelm's pupils, consistent with narcotic use but placed the constriction at the "low end of normal." Meloy did note indicators of past narcotic and marijuana use.

At the conclusion of the 12-step DRE Evaluation, Officer Meloy rendered an opinion that the Kelm was under the influence of a narcotic analgesic, which methadone is. Officer Meloy also opined that Kelm was not in a condition to safely operate a motor vehicle. Officer Meloy based his opinion on the noted observations during his interaction with Kelm.

I have prosecuted many, many OWI cases in my career. Based on my experience, I would describe the evidence of impairment observed by Deputy Jackson, including the field sobriety tests, as weak and "just sufficient," to make an arrest. Officer Meloy's observations during the DRE evaluation can be added to the observations made by Deputy Jackson. There is *some* potential evidence of impairment that can be gleaned from Officer Meloy's evaluation of Kelm. But as I noted earlier, like Deputy Jackson's observations, Officer Meloy's observations, by themselves, do not provide sufficient support to establish impairment to the level necessary to prove the impairment beyond a reasonable doubt.

Blood Test Results

The blood test result came back in late December, 2017 and revealed several things. The result is complex and deserves significant discussion. I will discuss the result through the next several paragraphs. The first thing that needs to be noted is that no alcohol was present in Kelm's blood.

The second thing of note is that the test result revealed that there was no delta-9 THC in Kelm's blood. Delta-9 THC is the psychoactive ingredient in marijuana that causes impairment. Wisconsin's Operating With a Restricted Controlled Substance Law, as set forth in Wis. Stat. s. 346.63(1)(am) prohibits a person from operating a motor vehicle with any detectable amount of a restricted controlled substance in their blood. Section 939.22(33), specifically and narrowly defines what constitutes a restricted controlled substance. When it comes to marijuana, only delta-9 THC is considered a restricted controlled substance under Wisconsin law, the other metabolites are not included. Therefore, because there was no delta-9 THC present in Kelm's blood, he could not be charged with Operating with a Restricted Controlled Substance (or Homicide by Operating a Motor Vehicle with a Restricted Controlled Substance).

As is standard, the lab tested for the other metabolites of marijuana – 11-Hydroxy-THC and Carboxy-THC. Again, these metabolites are not restricted controlled substances under Wisconsin's OWI law, and their presence alone cannot support OWI charges. The test result revealed that the metabolite 11-Hydroxy-THC was not present in Kelm's blood. Carboxy-THC was detected in Kelm's blood at 28 ng/ml. The presence of Carboxy-THC is not proof of impairment as it is an inactive metabolite that only shows that Kelm had smoked marijuana sometime in the past. Its presence in Kelm's blood corroborates his statement that he smoked marijuana the night before the crash.

The marijuana/THC results in the blood do not provide any evidence that Kelm was impaired at the time of collision. In fact, the blood test results provide evidence that Kelm was *not* under the influence of marijuana at the time, and that any potential impairment caused by his use the night before had dissipated. Therefore, Kelm's admission that he smoked the night before was rendered irrelevant to any consideration of impairment since the effects of the drug had ended. Moreover, the results corroborate the statements Kelm made on scene, which has the effect of adding to Kelm's credibility. A jury could reasonably infer that because Kelm was truthful about his marijuana use, he was truthful in all of his statements about the crash.

The blood test results also revealed that Kelm had 190 ng/ml of methadone in his blood. Methadone is a daily use drug that is typically administered at a clinic daily. While Methadone can be impairing when present in a new user, or at a high enough level, it is difficult for toxicologists to opine that a particular individual at a specific level is impaired. The Sheriff's Office investigation revealed that Kelm had been prescribed methadone through a Madison clinic since February, 2017. According to the documentation Kelm's clinic is in Madison, the direction he was traveling at the time of the collision.

The blood test further revealed that Kelm had anti-anxiety medications in his blood. The first was clonazepam at 23 ng/ml and a clonazepam metabolite at an unreported level. Kelm also had alprazolam at a level of 30 ng/ml. Both of these drugs are potentially impairing. A new user of anti-anxiety medications can have extreme levels of impairment. However, after regular daily use, the impairing effects of the drug become less significant and only the intended function (reduction in anxiety) is present. The Sheriff's investigation revealed that Kelm had prescriptions for both drugs dating back to 2014 (alprazolam) and 2015 (clonazepam). There was some confusion caused by the documentation, as the clonazepam indicated that it was discontinued in 2015, but the reason for the discontinuation was "reorder." Further information could not be obtained by the Sheriff's Office, though they did attempt repeatedly to further clarify the prescription situation. What the information amounts to is that Kelm did have a prescription for the drugs, and had been taking them for a long time. Both of these facts support the conclusion that they did not cause impairment in Kelm.

While the blood test results may suggest the possibility that Kelm could have been impaired by the use of prescription drugs – methadone, clonazepam and alprazolam – they do not provide evidence of proof beyond a reasonable doubt. Blood test results alone, are not sufficient to prove anything other than that the drugs were present. They very rarely can tell us anything about impairment. The levels in this case are not so high that a toxicologist could opine that impairment was certain.

Driving Behavior

An individual's actions behind the wheel can often provide convincing evidence of impairment in an OWI case. Unsafe or impaired driving behavior is often present, especially in cases involving a crash. In this particular case however, there is no evidence that Kelm was driving in an unsafe or impaired fashion prior to approaching the crash scene. Kelm and his passenger describe appropriate operation leading up to the scene of the crash, and there is nothing to refute that. There is no evidence that Kelm was speeding, and the Sheriff's investigation placed his speed at the beginning of the tire marks at 64.39 mph (Severson Crash Reconstruction Report, page 10). David

Engelhardt makes some claim in one or more of his varied statements that suggested that Kelm was speeding. However, for reasons discussed later, Engelhardt is not a credible witness and his observations cannot be relied upon.

At the point of the crash, Kelm describes a vehicle that he was following moving to the right and the Davis vehicle being suddenly presented to him in his lane of travel. At the point that Kelm reacts to the Davis vehicle parked in the fast lane, he steers left to avoid a collision. He is able to avoid Davis's vehicle, the Briesse/Engelhardt crashed vehicles, and the Theresa Casey vehicle parked on the shoulder. He only strikes Davis, who is standing in tall grass between the vehicles, not wearing reflective clothing. Kelm avoids the vehicles, all while rapidly decelerating from highway speeds, and is eventually able to park his vehicle on the shoulder of the highway. There is nothing about Kelm's driving – from his approach to the scene through the collision – that suggests that he was impaired. In fact, his driving maneuver actually suggests a lack of impairment.

One expressed concern was why did Kelm not observe the vehicle stopped in the lane of travel earlier and slow to avoid it? The Wisconsin State Patrol addresses this very complicated driving situation in their report, in part, with the following paragraph;

A vehicle stopped in the lane of traffic does create a potential hazard to other motorists. The perception and response to a stopped vehicle, facing the same direction as traffic approaching from the rear, is much more complicated than simply having a line of site. When perceiving and responding to a hazard, the perception of a hazard is something more than just vision. Perception also has to include categorization such as hazardous or not hazardous. Without clear contextual clues, an approaching motorist may not realize a vehicle ahead is stopped. Contextual clues would be such things as landmarks, curves in the roadway, and changes in elevation which make it easier to see that a vehicle is not moving within the environment. Without the contextual clues, an approaching motorist will not realize that they are closing in on an object until a certain visual expansion threshold is met. Visual expansion is the rate at which an object becomes bigger and bigger in a person's field of view as they get closer to the object. This concept would be similar to an artist drawing an object bigger or smaller depending on how far away they want the object to appear to the viewer. In addition, the vehicle would not be an immediate hazard until the approaching driver realizes that the vehicle is in their path of travel. The operator of the Ford parked in the southbound lane of traffic, violating the normal expectancy of motorists. As a result, a situation was created in which an approaching motorist had to perceive and react to the immediate hazard. (Wisconsin State Patrol Analysis Memorandum, page 1-2).

What we are left with is very little evidence to suggest impairment. Still, the State/County proceeded with the First Offense OWI trial in August of 2018. That trial was conducted by the most experienced trial attorney in the District Attorney's Office, Gilbert Thompson, who has more than 25 years of trial experience. In addition, Mr. Thompson has been the lead impaired driving prosecutor in the District Attorney's Office for most of his career. Mr. Thompson had prosecuted many thousands of impaired driving cases, and tried to jury, conservatively, over 200 such cases. He is one of the most experienced traffic prosecutors in the State. The jury heard all of the evidence the State had to offer on the issue of impairment and rendered a "not guilty" verdict.

This verdict has particular significance in this matter. First, it does not cause jeopardy to attach because the first offense OWI was civil, not criminal. See *State v. Thierfelder*, 174 Wis.2d 213 (1993). We could issue another criminal charge if we had the evidence. Second, the burden of proof in Kelm's civil OWI trial was lower than would be required

in a criminal case. Mr. Thompson only had to convince the jury that Kelm was impaired to the civil burden of proof. That burden is defined in Wisconsin Jury Instruction 140A as “a reasonable certainty by evidence which is clear, satisfactory, and convincing.” Such evidence is defined as;

Evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that the defendant is guilty because of its greater weight and clear convincing power. ‘Reasonable Certainty’ means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. (Wisconsin Jury Instruction 140A).

Unlike the First Offense OWI, if the State was to issue an OWI Homicide charge, the burden would be the higher, criminal burden of proof of Beyond a Reasonable Doubt as defined by Jury Instruction 140. That instruction states the following in describing reasonable doubt;

If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant’s innocence, you should do so and return a verdict of not guilty.

The term ‘reasonable doubt’ means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life. (Wisconsin Jury Instruction 140).

In addition to the lower burden the State/County benefited from in the First Offense OWI trial, the State/County only needed to convince 5/6 of the jury that Kelm was impaired. All 6 jurors joined in the “not guilty” verdict, and they came to their decision in short order – less than thirty minutes. The outcome of the civil First Offense OWI trial reaffirms that the proof of impairment in this case is weak. The fact that a very experienced OWI prosecutor could not obtain a conviction under the civil burden, indicates that the result at trial in a criminal case would be no different. The State lacks sufficient proof beyond a reasonable doubt to prove Kelm was impaired at the time of the crash.

The Affirmative - Due Care Defense

The second obstacle for the prosecution in this case is the fact that even if the State could prove impairment, Kelm has a clear and viable affirmative defense under Wisconsin’s Homicide by Intoxicated Use of a Motor Vehicle Statute – Wis. Stat. s. 940.09(2). Put in simple terms, the defense is that the crash would have happened regardless of any impairment.

The defense is codified in sec. 940.09(2)(a) and reads, “*In any action under this section, the defendant has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant, did not have a detectable amount of a restricted controlled substance in his or her blood, or did not have an alcohol concentration described under sub. (1) (b), (bm), (d) or (e) or (1g) (b) or (d).*”

The Wisconsin Jury Instruction 1185 provides the following language:

Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that this defense is established.

“By the greater weight of the evidence” is meant evidence which, when weighed against that opposed to it, has more convincing power. “Credible evidence” is evidence which in the light of reason and common sense is worthy of belief.

Evidence has been received relating to the conduct of victim at the time of the alleged crime. Any failure by victim to exercise due care does not by itself provide a defense to the crime charged against the defendant. Consider evidence of the conduct of victim in deciding whether the defendant has established that the death would have occurred even if the defendant had not been under the influence of an intoxicant and had been exercising due care. (Wisconsin Jury Instruction 1185)

The investigation of this crash clearly suggests that there is sufficient evidence to support the affirmative due care defense in this case. Kelm describes traveling behind a vehicle as he approached the scene of the crash. That other vehicle, according to Kelm, veered into the outside lane shortly before reaching Davis's vehicle parked in the center of the inside (fast) lane. At the point that the vehicle changes lanes, Kelm is presented with a parked car in his path, and a very short time to make a decision. He decides to steer left and successfully avoids hitting the Davis vehicle and the other three vehicles on scene.

There has been some confusion or contention as to where Davis's vehicle was parked. The investigation conclusively shows, through the physical evidence and statements, that Davis's vehicle was not only parked in the lane of traffic, but was somewhat closer to the lane divider (white dashed line) than the yellow inside centerline. There are several photographs that illustrate this fact, including a photograph taken at 5:48 am by the Sheriff's Office which shows the Davis vehicle in the lane and the Theresa Casey vehicle pulled off the road and on the shoulder. The Davis vehicle was not moved prior to that photo or the several others that were taken after sunrise.

Additionally, Nathan Lyman describes the striking of Davis and his immediate reaction as follows in the written statement he gave on August 17, 2017: *“I heard a loud thud and felt a gush of air. I turned around and the woman wasn't there. I turned the other way and saw a truck coming to a stop further up 151 North in the ditch. I then realized she might have just been hit. I ran to see if she had gone around the other side of her car, she wasn't there, but that's when I realized she was stopped in the middle of the fast lane of 151 North.”* (**Kelm and Davis were traveling South on Highway 151, while Lyman had been traveling North, which explains Lyman's use of the term “151 North” incorrectly.) Other witnesses and evidence conclusively support the fact that Davis parked her vehicle in the fast lane. The only witness that says otherwise is David Engelhardt, who, again for reasons described later, is not a credible witness.

As part of its investigation, the Wisconsin State Patrol created a simulation in an attempt to determine if it was possible for Kelm to have followed the path of his tire marks if the car he said was in front of him drove in the fashion he said it did. The question was centered on the issue of whether Kelm could have entered the ditch at the angle he did,

given the time, speed, and distance. The simulation revealed that that Kelm could have made the driving maneuver he did, in the fashion he described, with the vehicle in front of him changing lanes as he said it did. The simulation video created by the State Patrol Reconstructionists is available for review.

The Wisconsin State Patrol's review noted the following considerations as to the driving conditions:

The lighting conditions were dark and no artificial light was present at time of the collisions. The emergency call was received by the Dodge County Communications Center prior to the start of civil twilight.

There were adverse weather conditions around the time of the collisions. The roadway was wet and the conditions were likely misty around the time of the crash. Deputy Wolfe reported that the roads were wet and that he had to use his windshield wipers as he responded to the crash scene. Theresa Casey (witness) stated that it was drizzling. Nathan Lyman (witness) noted that the roadway was wet enough that you could spin your tires. Video footage from responding squad cars shows intermediate misting weather conditions and windshield wipers being utilized. (Wisconsin State Patrol Analysis Memorandum, page 1).

The evidence clearly establishes that the time of day and the weather conditions would have affected visibility, especially when it comes to the visibility of non-reflective objects. The available evidence suggests that Kelm was traveling at or near the speed limit. The other motorists all indicated speeds near or slightly above the posted limit for their own operation, so Kelm's operation at 65mph under these conditions was consistent with other traffic. There is no evidence that Kelm was not operating with due care at the time of the crash. Weather and lighting conditions affecting visibility, as well as the driving behavior of other motorists, all beyond the control of Kelm, were also factors contributing to this crash.

The Wisconsin State Patrol made the following observations on this point:

The physical evidence suggests that the operator of the 1999 Dodge Ram pickup, Troy Kelm, reacted to the stopped Ford. The initial tire mark evidence indicates that he steered left, braked, traveled into the median and struck the pedestrian. The pedestrian, Kayla Davis, sustained fatal injuries as a result of this collision.

The available physical evidence suggests the pickup truck was traveling at a speed proximate to the speed limit.

The operator of the Dodge's reaction to the stopped Ford was to steer left. With the benefit of hindsight, it can be concluded that the driver's reaction led to an undesirable result. It would be difficult to draw any conclusions regarding the appropriateness of the driver's response for several reasons. Dark lighting conditions, wet weather conditions, and potential headlamp glare could have complicated the driver's perception of the stopped vehicle and ultimately his response to it. The exact conditions that may have existed at the time of the collision would be difficult to replicate. In addition, Mr. Kelm stated he observed the stopped Ford after a car in front of him changed lanes. There is no factual evidence to confirm or refute the existence of a lead vehicle, or its distance from the Ford when it changed lanes. (Wisconsin State Patrol Analysis Memorandum, page 1-2).

The only witness that contests Kelm's claims and the evidence gathered by The Sheriff's Office is David Engelhardt. As I have noted earlier, Engelhardt is not a credible witness.

Engelhardt apparently has some connection with the Davis family and was in communication with one or more of the family members after the crash and during the original Sheriff's Office investigation. Davis apparently made some claims during these communications that called into question the investigation's findings. Engelhardt was also contacted and interviewed by the Davis family civil attorney's investigator. He later was interviewed by Deputy Severson. During these various interviews he gives somewhat varying stories and factual accounts.

At the scene, Engelhardt provides a written statement that does not address anything about the Kelm crash. He only addresses his own crash. During the interview with the civil attorney's investigator, Engelhardt claims that he was originally given two statement forms by a deputy on scene - one to write about his own crash on and the other to write about what he had to say about the Davis/Kelm crash. Englehart claims that he told that deputy that he did not see Davis get hit, but saw Kelm's truck. According to Englehart, after hearing this, the deputy took the second statement form away from him saying he did not need it. It is difficult to find this statement credible however, since the deputy's actions in taking away the statement form would be very inconsistent with police procedure.

Further suggesting that Englehart's claim is not credible is the fact that other witnesses, who also did not see Davis get struck but saw Kelm's truck, were asked by deputies to write statements. Those witnesses wrote statements. One of those witnesses was Tyler Briese who provided a single, combined statement about the Briese/Engelhardt crash and about the Davis/Kelm crash. Engelhardt's claim that the deputy did not want his statement is inconsistent with standard procedure - the procedure that was clearly used in this very case with other witnesses.

During the interview with the civil investigator, Engelhardt states that the road was not wet and it was not raining. This is refuted by nearly every piece of evidence in the case. The witnesses all describe wet pavement, with one indicating the pavement was so wet he could spin his tires. The crash report describes the conditions as wet. One witness describes water so deep in the median that his clothing and shoes were soaked. NOAA weather data for the area shows several storms moving through the area and a responding deputy's video clearly shows the use of his windshield wipers.

Engelhardt goes on during the civil investigator's interview to provide a very detailed description about Davis being parked on the shoulder and off the road, which again, is refuted by all the evidence. He goes on to claim that Kelm attempted to leave the scene and was stopped by another person. The evidence clearly shows otherwise. Briese was specifically asked if Kelm tried to leave and Briese said Kelm did not. Additionally, Kelm called 911 seeking help for Davis and reported that he had hit her. Calling 911 and admitting to hitting Davis is an act that clearly shows he was not trying to flee.

In the civil investigators interview, Engelhardt claims that he clearly saw that there was no other vehicle in front of Kelm and that there was no vehicle in the inside(slow) lane that prevented Kelm from going the other way around the Davis vehicle. The Wisconsin State Patrol made several observations that call into question this kind of detailed description from Engelhardt:

David Engelhardt was the only witness that had a detailed recollection of traffic conditions at the time of the crash. He stated that he didn't see any other vehicles

around the time that the Dodge Ram struck the pedestrian. He also stated that the next vehicle that came through the area was 20 seconds after Kayla Davis was struck.

Observations made by other witnesses at the scene would seem to question Engelhardt's ability to make and remember detailed observations about the traffic conditions at the time of the crash. Theresa Casey stated that the driver of the car near Kayla was bending over and was in shock. Nathan Lyman described the driver of the red car as being disoriented and shook up. Lyman also stated that Kayla had pointed to the driver of the red car and stated, "He needs to sit down." Lyman stated that he was making sure the guy from the red car wasn't going to fall over when he heard the collision.

David Engelhardt stated that Kayla's vehicle was pulled off onto the gravel part of the roadway. He indicated that not much of her vehicle could have been in the traveled portion of the roadway. These observations are not consistent with the documented physical evidence. (Wisconsin State Patrol Analysis Memorandum, page 2).

What this all amounts to is a finding that Engelhardt is not a credible witness. His lack of credibility and glaring inconsistencies with the observations of the other witnesses on scene and the physical evidence actually suggests that Engelhardt is being untruthful. It is not clear what led him to make these claims. Perhaps he felt badly for the Davis family and said some things in an attempt to make them feel that Kelm was more at fault. The interview done by the civil attorney investigator was very leading and suggestive in several parts as to many details. It may be that Engelhardt was subject to suggestion. Regardless, he cannot be relied upon for information in this case. Much of the information he provided is shown to not only be less-than-credible, but provably false.

In light of all of the evidence in this case, even if the State were able to prove that Kelm was impaired and could support an OWI Homicide charge, it does not believe it could overcome the statutory affirmative due care defense. There is no evidence to suggest that Kelm was driving inappropriately on a wet, dark morning. He encountered a crash scene where a passerby had parked their vehicle in the fast lane of a four-lane divided highway where the speed limit was 65 miles per hour. He reacted to the vehicle and managed to avoid striking it, and three other vehicles on scene. Davis was standing in tall grass and not wearing any type of reflective clothing. There was no way for Kelm to know that she was in his path of travel – a path of travel he was forced to take because he was trying to avoid colliding with a vehicle parked in his lane of travel. There is no evidence to refute that Kelm was exercising due care at the time he struck Davis, and as such, the State would not be able to overcome the statutory affirmative defense.

For the above reasons, the State will not be issuing Homicide by Intoxicated Use of a Motor Vehicle charges in this case. First, the State does not believe that it can prove beyond a reasonable doubt that Kelm was impaired at the time of the crash. Second, even if it could prove impairment, the State does not believe that it could overcome the statutory affirmative due care defense.

Negligent Homicide

While the case was referred in for a review sufficient on OWI Homicide charges, as in any case, the State considered all criminal offenses that might be applicable based on the facts and circumstances. The only other potential offense that the State identified is Homicide by Negligent Operation of a Vehicle under Wis. Stat. s. 940.10.

Wisconsin Jury Instruction 1170 defines the elements of the offense as follows:

- 1) *The defendant operated a vehicle.*
- 2) *The defendant operated a vehicle in a manner that constituted criminal negligence.*
- 3) *The defendant's criminal negligence caused the death of the victim. "Cause" means that the defendant's act was a substantial factor in production the death.*

The instruction goes on to explain that "criminal negligence" means

- a) *The defendant's operation of a vehicle created a risk of death or great bodily harm; and*
- b) *The risk of death or great bodily harm was unreasonable and substantial; and*
- c) *The defendant should have been aware that his operation of a vehicle created the unreasonable and substantial risk of death or great bodily harm.*

As in the affirmative defense under the homicide by intoxicated use of motor vehicle charge, a jury may also consider the conduct of the victim in reaching a verdict:

Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care does not by itself provide a defense to the crime charged against the defendant. Consider evidence of the conduct of (name of victim) only to the extent that it relates to (describe the element of the crime or the defense to which the evidence relates).

Wisconsin Jury Instructions-Criminal 926.

The first element is not at issue in the Kelm crash. Kelm operated a vehicle. The third element linking the death to that operation is partially not at issue – Kelm's operation of the vehicle was a substantial factor in the death of Davis. However, the issue of whether Kelm was criminally negligent in the operation of his vehicle is clearly at issue.

The law requires that the State prove beyond a reasonable doubt that Kelm's operation at the time of the crash created a substantial and unreasonable risk of death or great bodily harm, and Kelm should have been aware of that risk.

One suggestion that has been made is that a person creates an unreasonable and substantial risk of death or great bodily harm merely by driving a vehicle under the influence of drugs. While at first blush this may sound logical, it is not supported by the law. This is especially true with prescription drugs, particularly in situations where the person holds a valid prescription and has been taking the drugs for a long time. If we were to construe the law to say that it is *per se* criminal negligence to operate a motor vehicle while taking a potentially impairing prescription drug, every person who treats a chronic condition with medication that in some doses, or under some conditions, can impair would be required to surrender their driver's license. While this may be attractive and even beneficial to some, the law does not support this approach.

A person who has taken a prescription drug for an extended period of time, and understands its effects, does not engage in criminal negligence merely by driving a vehicle. We have impaired operation laws to address actual impairment while driving,

and the criminal negligence law is not supportive of such a prosecution in every case where a crash involves a motorist who uses a potentially impairing prescription drug.

In Kelm's circumstance, he was legally prescribed the medications he was taking and had been taking them for a lengthy period of time. There is no evidence to suggest that he used them in inappropriate doses on the date in question. There is also no evidence to suggest that he had any reason to believe that the medications affected his ability to operate a vehicle. As such, there is no evidence in this case to support a criminal negligence prosecution under such a theory.

That leaves us with Kelm's driving behavior itself as the basis for the criminal negligence charge. That proposition is not supported by any evidence. As explained earlier in the discussion of the affirmative due care defense, there is no evidence to suggest that Kelm was driving in an unsafe, unreasonable, or criminally negligent manner. As previously discussed, the State would be unable to present evidence to suggest that Kelm was not exercising due care at the time of the crash. Given that, it follows that the State would not be able to establish that Kelm's operation created an unreasonable and substantial risk of death or great bodily harm. He was not speeding, and he did what he could to react and respond to a vehicle that was illegally parked in his lane of travel. Kelm avoided hitting the vehicle, as well as the three other vehicles on scene, but unfortunately and tragically, struck and killed Davis. While some may now question Kelm's decision to turn left instead of right to avoid the crash, it cannot be said that his decision to turn to the left amounted to criminal negligence.

The Wisconsin State Patrol addressed this issue as follows:

The operator of the Dodge's reaction to the stopped Ford was to steer left. With the benefit of hindsight, it can be concluded that the driver's reaction led to an undesirable result. It would be difficult to draw any conclusions regarding the appropriateness of the driver's response for several reasons. Dark lighting conditions, wet weather conditions, and potential headlamp glare could have complicated the driver's perception of the stopped vehicle and ultimately his response to it. The exact conditions that may have existed at the time of the collision would be difficult to replicate. In addition, Mr. Kelm stated he observed the stopped Ford after a car in front of him changed lanes. There is no factual evidence to confirm or refute the existence of a lead vehicle, or its distance from the Ford when it changed lanes. (Wisconsin State Patrol Analysis Memorandum, page 2).

Clearly, if we consider Kelm's driving behavior (and the end result) in a vacuum, without taking any of the surrounding circumstances into account, a convincing case of criminal negligence could be made. Driving through a crash scene at highway speeds clearly creates an unreasonable and substantial risk of death or great bodily harm. This is especially true when one threads their vehicle between multiple stopped and crashed vehicles during the hours of darkness. However, we cannot consider Kelm's driving in a vacuum. The law does not allow it. The reality is that Kelm had three choices at the point he perceived Davis's vehicle in the lane of travel; 1) Strike Davis's vehicle and certainly cause injury to himself, his passenger and anyone in Davis's vehicle, 2) Steer right and hit the vehicle that he claimed had been traveling in front of him and had moved into that lane and likely cause injury to himself, his passenger, and anyone in that car, or 3) Steer left and avoid hitting Davis's vehicle and the vehicles in the median. At the point he made the decision to steer left, he did not know that Davis would be standing in the median directly in his path of travel. There is no evidence to suggest that he knew, or should have known that Davis was standing there when he made that decision. Under these circumstances, Kelm's decision to steer left onto the shoulder and into the median cannot be characterized as criminal negligence.

Even if we were to reject Kelm's statement that there was a car in the right lane and assume that lane was clear, Kelm's driving still cannot be said to be criminally negligent. While in this situation we would say that a right steer was the proper decision, we also have to accept the reality that Kelm, like any other driver, had to make this decision while traveling over 95 feet per second (65 mph) approaching an unexpected stopped vehicle in the lane of travel. Any driver in Kelm's position had to understand and comprehend the hazard, assess the options, formulate a plan, and execute the plan. The Sheriff's Office indicated that it would take 1.5 seconds after the Davis vehicle was recognized as a hazard to process and react. During that time Kelm would have traveled 143 feet. The Sheriff's Office may be underestimating the actual perception reaction period as the 1.5 seconds is reserved for people that are on the high end of the continuum for perception reaction (many people need more than 1.5 seconds). Additionally, the more complicated the situation, the longer it will take a driver to choose the best option. Suffice to say, Kelm was presented with a complex situation while traveling at highway speeds, one involving multiple vehicles, including one stopped where it would not be expected, poor lighting, headlights from the crashed vehicles facing his direction, and wet roads.

Additionally, the Wisconsin State Patrol points out that in a situation like this one, the perception/reaction clock does not even start ticking at the point at which Kelm initially sees the Davis vehicle. This is because it would not become clear to a driver that the Davis vehicle was actually stopped in the lane of travel until there were sufficient clues to cause the driver to understand the vehicle was not moving. Since vehicles are not typically stopped in the lane of travel, Kelm would have initially expected the Davis vehicle to be moving. By the time Kelm came to the understanding of the hazard – a parked vehicle in the middle of his lane - he may have been already been at that minimum required perception reaction distance.

The law does not expect or require human beings to make perfect decisions under highly stressful, complex and unexpected conditions. Steering left was the choice that Kelm made and Davis died. While this outcome is tragic, given the circumstances, the State does not believe that Kelm's driving created an unreasonable and substantial risk of death or great bodily harm. As such, the State cannot bring a charge of Homicide by Negligent Operation of a Vehicle against Kelm.

Final Statement

It is a well-accepted principle that a prosecutor should not file or pursue charges against an individual unless he or she believes that the charges can be proved beyond a reasonable doubt. See SCR 20:3.8 (a) and (e); A.B.A. *Standards for Criminal Justice Relating to the Prosecution Function*, Standard 3-3.9. ("A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."); see also, *Thompson v. State*, 61 Wis. 2d 325, 330, 212 N.W.2d 109 (1973)("[. . .] it is an abuse of discretion to charge when the evidence is clearly insufficient to support a conviction,").

It is this principle that must guide the State's decision in this case. After a thorough investigation by the Dodge County Sheriff's Department and the Wisconsin State Patrol, and after careful consideration of all of the evidence and applicable law by both myself and Assistant Attorney General Tara Jenswold, the State will not be bringing criminal charges against Troy Kelm for his involvement in the August 17, 2017 crash that resulted in the death of Kayla Davis. The investigation and file are closed.

REQUEST FOR CRIMINAL COMPLAINT (REVIEW SUFFICIENT)

DEFENDANT INFORMATION

FIRSTNAME, MI, LASTNAME: **TROY R. KELM**

D.O.B.: **10/25/88**, GENDER: **M**, RACE: **W**, EYES: **BLU**, HAIR: **BLND**, HGT: **511**, WGT: **190**

ADDRESS: **808 S. LINCOLN AVE #106**

CITY/STATE/ZIP: **BEAVER DAM, WI 53916**

HOME PHONE #:

WORK PHONE #:

FINGERPRINTS TAKEN: ☐ YES ☒ NO

FINGERPRINT DISPO SHEET(S) ATTACHED: ☐ YES ☒ NO

WISCONSIN CIB ID#:

NCIC/CIB/DRIVER'S RECORDS MUST BE ATTACHED

CHARGE #1:

AGENCY INCIDENT #: **17-20124** DATE & TIME OF INCIDENT: **08-19-17 5:16AM**

DOMESTIC ABUSE INCIDENT: **No** PRIOR DRUG CONVICTION: **No** GANG INCIDENT: **No** BOND POSTED: **No** AMOUNT:

LOCATION OF INCIDENT (INC. MUNICIPALITY): **US HWY 151 & FOREST ROAD, TOWNSHIP OF CALAMUS**

CHARGE DESCRIPTION: **HOMICIDE BY INTOXICATED USE OF A VEHICLE**

STATUTE # (WITH SUBSECTIONS): **940.09(1)(A)**

MODIFIERS/ENHANCERS:

VICTIM: FIRSTNAME, MI, LASTNAME: **KAYLA M. DAVIS**

D.O.B.: **3/22/80**, GENDER: **F**, RACE: **W**, EYES: **GRN**, HAIR: **BRO**, HGT: **504**, WGT: **185**

COMPLETE ADDRESS: **331 PARK AVE, BEAVER DAM, WI 53916**

HOME PHONE #:

WORK PHONE #:

WITNESS: FIRSTNAME, MI, LASTNAME:

D.O.B.: , GENDER: , RACE: , EYES: , HAIR: , HGT: , WGT:

COMPLETE ADDRESS:

HOME PHONE #:

WORK PHONE #:

DRUG TASK FORCE INFORMATION:

DRUG TYPE:

DRUG WEIGHT:

TASK FORCE FUNDS USED:

POSSIBLE ASSET FORFEITURES:

WEAPON(S) SEIZED:

CI BUY: ☐ OFFICER BUY: ☐ SEARCH WARRANT: ☐ CONSENT SEARCH: ☐ TRAFFIC STOP: ☐

☒ **ADDITIONAL CHARGE SHEET(S) ATTACHED**

CO-ACTOR NAMES:

NAME & TITLE OF PERSON WHO WILL SIGN AS COMPLAINANT: **DEPUTY BRIAN SEVERSON**

I HAVE REVIEWED THE ATTACHED

☐ A COMPLAINT IS REQUESTED

REPORTS & STATEMENTS AND:

☐ I WISH TO DISCUSS POINTS OF LAW WITH THE DA/ADA

☒ OTHER: SPECIFY: DA REVIEW FOR CHARGES

SIGNATURE OF PERSON SUBMITTING REQUEST: _____

DEPARTMENT: **DODGE COUNTY SHERIFF'S DEPARTMENT**

DATE: _____

FOR D.A. OFFICE USE ONLY:

RECEIVED STAMP:

DA#:

ASSIGNED TO:

ENTERED BY:

DATE/TIME:

Revised: 7/2/18



DODGE COUNTY SHERIFF'S OFFICE CRASH INVESTIGATION TEAM COLLISION ANALYSIS REPORT

Case #: 2017-20124

Crash Date: August 17, 2017

Location: US 151 and Forest Rd.
Township of Calamus
Dodge County, Wisconsin

Prepared by: Deputy Brian H. Severson
Traffic Crash Reconstructionist/ Investigator
Crash Data Retrieval (CDR) Technician/Analyst
Dodge County Sheriff's Office
Crash Investigation Team

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Traffic Crash Reconstruction is a comprehensive subject with many facets and specialty fields. The following reconstruction is limited to the subjects stated herein. The authors and the Dodge County Sheriff's Office reserve the right to conduct a more extensive analysis of the available material on a later date as necessity dictates.

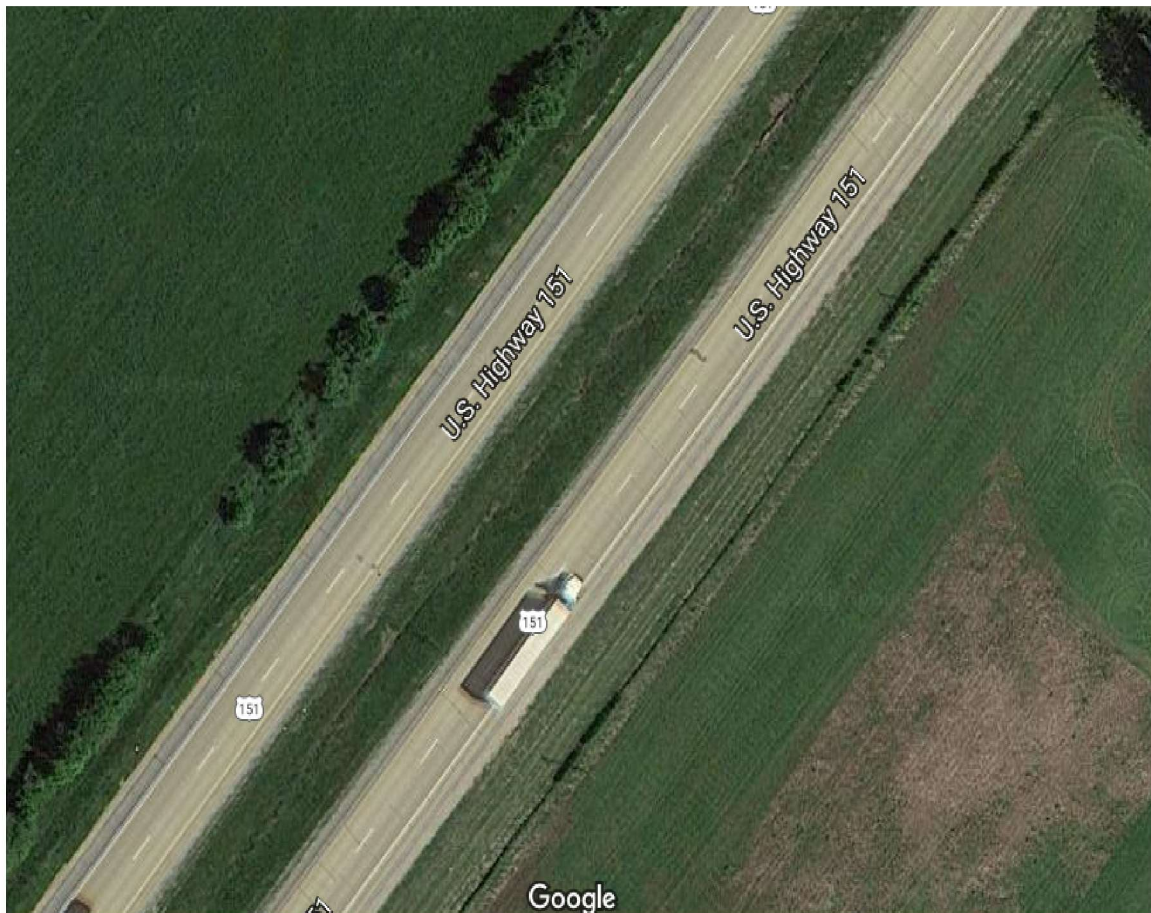


FIGURE #1

SUMMARY

On August 17, 2017 at approximately 5:16 pm I was dispatched to and investigated a multi-vehicle crash on US 151 near Forest Rd., Township of Calamus, Dodge County, Wisconsin. The location is shown in figure #1 above. A prior crash occurred (a few

minutes earlier) when a 2003 Toyota Corolla, bearing Wisconsin registration 488TBM was being operated north bound on US 151 in the right/east lane by Tyler B. Briese. Tyler was approaching, from the rear, a 2017 Chevrolet Cruze, bearing Wisconsin registration 919YMS, which was being operated in the right/ east lane of US 151 by David T. Engelhardt. Tyler realized he was traveling much faster than David's vehicle and attempted to swerve into the left/ west lane of US 151. Due to the wet roadway Tyler's vehicle hydroplaned and struck David's vehicle causing both vehicles to go into the median ditch where they came to rest. After seeing the first crash a 2011 Ford Escape, bearing Wisconsin registration 542PVP, was being operated south bound on US 151 in the left/ east lane by Kayla M. Davis. Kayla stopped her vehicle in the left/inside lane of traffic on US 151, and got out of her vehicle to check on the driver's involved in the first crash. Kayla had walked down into the median ditch, when a 1999 Dodge Ram 1500, bearing Wisconsin registration 692045, was being operated south bound in the left/ east lane of US 151 by Troy R. Kelm. Kelm was following another vehicle in front of him when that vehicle moved into the right/ west lane of US 151. Kelm then saw Kayla's vehicle and realized it was in the lane he was traveling. Kelm took an evasive maneuver by steering his vehicle to the left and entering into the left/ east median ditch where Kayla was standing. Kayla was struck by the front of the pickup truck where she was standing in the median ditch. Kelm's vehicle continued to travel south through the median until it came to a stop on the left/ east shoulder of US 151.



FIGURE #2

Figure #2 shows US 151 facing south. (This photograph is from Google Maps and was not taken on the crash date). The red arrow is showing the lane where Davis stopped her vehicle.

OBJECTIVES

The objectives of this investigation are to determine:

- How fast the Dodge was traveling during the crash sequence
- Why this crash occurred
- Whether or not alcohol and/or drugs contributed to the crash
- If there were any possible vehicle or environmental factors that may have contributed to the crash
- Any violations of Wisconsin law
- If the driver was distracted by any items or objects
- If any other vehicles played a role in this crash



FIGURE #3

OBSERVATIONS AT CRASH SCENE

When I arrived on scene, I could see that there was a 2017 red in color Chevrolet Cruze, bearing Wisconsin registration 919YMS, which came to rest facing north in the middle of the grassy median ditch. I could see tire marks in the tall grass leading up to the Chevrolet which indicated to me that the Chevrolet had been traveling north bound. Behind the Chevrolet I could see a silver in color Toyota Camry facing north partially up the embankment in the middle of the grassy median ditch line (See *figure #3*). As I got closer to the Toyota I could see 3 tire marks where the Toyota had entered the grassy median ditch line. This indicated to me that the Toyota was headed north bound and that the

Toyota was in a counter clockwise rotation as it was entering the median ditch. I could see that the windshield wipers on the Toyota were in the up position. In the gravel shoulder of the roadway and on the asphalt rumble strip I could see skid marks which went left/ east into the grassy ditch. Just in front of those skid marks I could see a dark silver in color Ford Escape bearing, Wisconsin registration 542PVP, stopped in the left/ east south bound lane of US 151 with the driver's side door completely opened. As I walked past the Ford Escape I could see a purse sitting on the driver's seat and could hear that the vehicle was still running. As I continued to walk south on US 151 I could see those tire marks which entered the grassy ditch went down towards the center and then curved back to the right/ west and lead to where a blue in color Dodge Ram pick-up truck was parked on the grassy shoulder. Behind the Dodge Ram pickup truck I could see a dark green tarp covering Kayla's body.

FIRE AND MEDICAL RESPONSE

The Beaver Dam Fire Department, Beaver Dam Paramedics, Flight for Life, Beaver Dam Police Department responded to the scene. The Watertown Police Department was also requested for a Drug Recognition Expert (DRE). The driver and passenger in the Dodge denied medical treatment at the scene.

ROADWAY AND WEATHER CONDITIONS

This section of US 151 is paved concrete and is a 4 lane roadway, primary north and south direction, when traveling south bound. US 151 has a divided median. There are 2 lanes of traffic on the north bound side which is also paved concrete (*See Figure #1*). The roadway is marked with a white dash line for both north bound and south bound lanes. The speed limit is posted 65 mph throughout the area where this crash occurred. Due to the wet roadway, hours of darkness and glare from lighting from other vehicles, view obstructions may have been present at the time of the crash. I obtained weather conditions from the National Weather Service-Milwaukee/ Sullivan, Wisconsin and the conditions in Juneau, Wisconsin at 5:35 am CDT on the date of the crash were reported as: Overcast 72 F 22 C, Humidity 96%, Wind Speed S 9 mph, Barometer 29.72 in, Dew point 71 F (22 C), Visibility 7.00 mi, Last update 17 Aug 5:35 am CDT

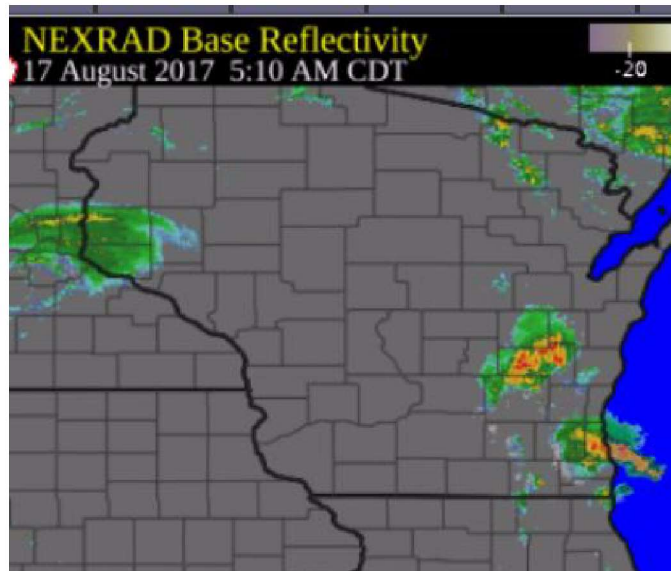


FIGURE #4

The crash occurred at approximately 5:16am. *Figure #4* is a snapshot of NEXRAD Doppler radar at 5:10am which shows that heavy rain had just moved through the location of the crash (additional NEXRAD snapshots taken approximately 10 minutes before the crash are included in additional reports).



FIGURE #5

Figure #5 is a snapshot from the ICOP dashcam video recorder from the squad Dodge County Sheriff's Deputy Ryan Jackson was driving on US 151 as he was responding to the crash scene at approximately 5:34am. Water and glare from the wet roadway and lights from other vehicles can be seen in this snapshot.

TIRE AND EVIDENCE MARKINGS ON THE ROADWAY

As I viewed the crash scene looking north to south I could see a red Chevrolet Cruze, bearing Wisconsin Registration 919YMS, I could see that the Dodge entered the east gravel shoulder. On the shoulder of the roadway I could see that there was a skid mark on the rumble strip that went to the left/ east and transitioned to the gravel shoulder and grassy median ditch. In the gravel shoulder I could see a second skid mark from what I determined to be the driver side tires transition into the grassy median ditch. As I continued walking south I could see a silver rubber cell phone case lying on top of the grass. Beyond the cell phone case I could see a black and pink Under Armour tennis shoe. A little further down into the median ditch I could see a piece of a head light. As I continued walking south into the ditch, following the Dodges tire marks, I could see a dark green tarp covering Kayla's body. I could see that after striking Kayla's body the Dodge had started going back up the grassy ditch embankment towards the north bound traffic lanes, but turned slightly to the right/ west going back down the embankment through the ditch coming to rest on the left/ east grassy shoulder of the south bound lanes of US 151.

1999 DODGE RAM

The vehicle Kelm was operating at the time of the crash was a 1999 Dodge Ram, blue in color, displaying Wisconsin license plate 692045 and VIN 3B7HC13Z3XM564792. A Carfax vehicle history report shows no prior damage or accidents.



FIGURE #6

KELM INITIAL STATEMENT

I identified the driver verbally as Troy R. Kelm (M/W, 10/25/88) and asked him to tell me what happened. Kelm told me that he was going south on US 151 following a car that was in front of him. Kelm said that as he was approaching Forest Road the vehicle in front of him changed lanes into the slow/ outside lane. Kelm said that was when he saw Kayla's vehicle which he could see was parked in his lane. Kelm said that he steered his vehicle to the left/east to avoid crashing into the other vehicle. Kelm said that when he started to enter the median he could see two other vehicles that were also in the median and then started to steer his vehicle so that he would go in between the vehicle parked on US 151 and the two vehicles in the median. Kelm said that is when he struck the female. Kelm said that he went down into the median and was able to steer his truck back onto the shoulder where it was currently parked. Kelm said he called 911 immediately. I asked Kelm if he had seen the female standing in the median and he told me no. I asked Kelm how he knew the vehicle was parked in his lane on US 151 and Kelm said he could see the tail lamps for the vehicle. Kelm then said that he would perform field sobriety tests if that would help. I asked Deputy Jackson to perform field sobriety tests on Kelm since he had admitted to smoking marijuana hours before the crash.

SPEED OF DODGE RAM

Sergeant Walston and Detective Sullivan are certified Pedestrian Vehicle Crash Reconstructionist's, trained and certified by Northwestern University. They used the total station points list to calculate two different speed formulas for the vehicle versus pedestrian crash. Those results were 53.68mph and 52.89mph (very close to each other).

Those speeds are accurate as to how fast the Dodge was traveling at the time of impact with Kayla Davis. One of the tire marks (due to driver input after the pedestrian collision, these are not entirely braking or skid marks) left by Kelm's vehicle measured 425 feet in length, approximately 75.10 feet of which was before impact. Sergeant Walston and Detective Sullivan used a speed formula (using AR Pro mathematical software) which showed the speed of the Dodge to be approximately 64.39mph at the start of the tire mark (please note that the section of roadway where this crash occurred is posted at 65mph). The 1999 Dodge Ram that Kelm was operating at the time of the crash is not supported by the Bosch CDR software, so no event data recorder information is available to be analyzed from that vehicle.



Dodge County Sheriff's Office
Crash Investigation Team
124 West Street
Juneau, WI 53039
920-386-3726

BARZELEY PEDESTRIAN

Find a Vehicle Impact Speed with a Pedestrian Throw Distance.

$$S = \sqrt{58 + (24 \times D)} - 7.6$$

$$S = \sqrt{58 + (24 \times 154.1000)} - 7.6$$

$$S = \sqrt{58 + 3698.4000} - 7.6$$

$$S = \sqrt{3756.4000} - 7.6$$

$$S = 61.2894 - 7.6$$

$$S = 53.6894$$

S = The Speed in MPH.
58 = A Constant.
24 = A Constant.
D = The Distance in Feet
7.6 = A Constant

Formula Inputs:

The Throw Distance is: 154.1000

Formula Results:

The Speed in MPH is: 53.6894
The Velocity in FPS is: 78.7444

FIGURE #7

BLOOD TEST KELM

Dodge County Sheriff's Deputy Ryan Jackson arrested Kelm for Operating While Impaired and Drug Recognition Expert (DRE) Jeff Meloy (from Watertown Police Department) conducted a drug evaluation of Kelm. The blood sample was delivered to the Wisconsin State Hygiene Laboratory- Madison for analysis. Two medications were present in the blood of Kelm in the blood sample obtained for the impaired driving offense. The two medications were identified as Alprazolam (Xanax) in the quantity of 30 ng/mL and Clonazepam (Klonopin) in the quantity of 23 ng/mL. Kelm had a prescription for both medications.

2011 FORD ESCAPE

The vehicle Kayla Davis was operating prior to the crash was a 2011 Ford Escape, black in color, displaying Wisconsin license plate 542PVP and VIN 1FMCU9D74BKA53798. *Figure #8* is a photograph of the Escape in the position (on US Highway 151 in the left/inside lane of southbound traffic) where Kayla Davis parked it as she got out of the vehicle and began to render aid to persons involved in another motor vehicle crash.



FIGURE #8

POSITIONING OF FORD ESCAPE ON US HIGHWAY 151

At the time of the crash the Ford Escape was parked and unattended in the left/inside traffic lane of US Highway 151. The headlamps and 4-way flashers were in operation and the driver's door was fully open. Using the recorded points from the total station points list, Sergeant Walston generated a diagram (using Crash Zone reconstruction software) to show the distances between the Escape and other portions of the roadway (see *FIGURE #9*)

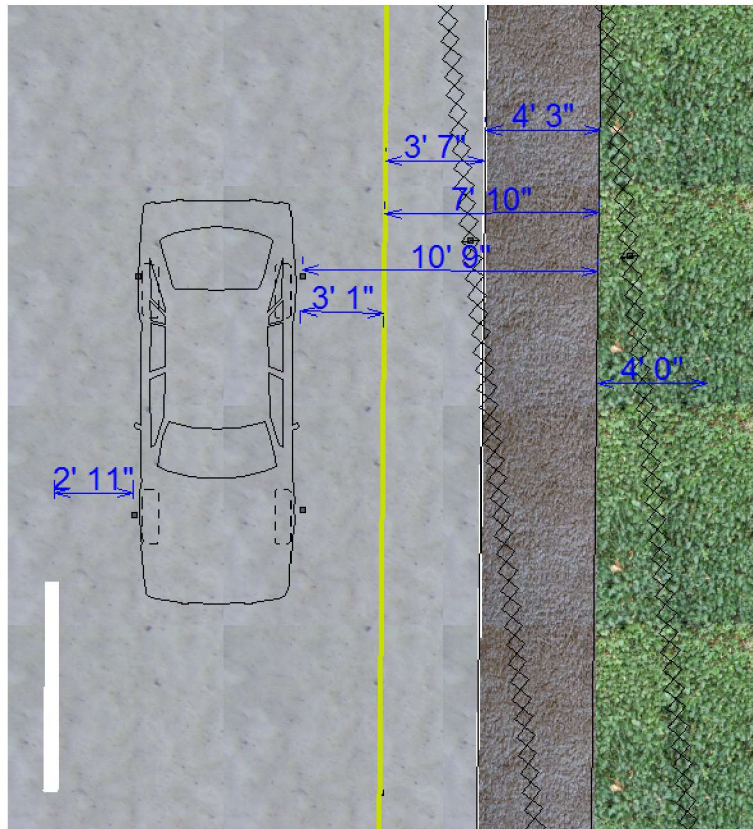


FIGURE #9

The following measurements are shown in *FIGURE #9*:

- 4'3" from of gravel shoulder, starting at edge of pavement and ending at grass line
- 3'7" from yellow line to paved road edge
- 7'10" from yellow line to edge of gravel shoulder where grass starts
- 10'9" from left rear wheel to edge of gravel shoulder where grass starts
- 3'1" from left rear wheel to yellow line
- 4'0" from edge of gravel shoulder where grass begins to where gravel ends (grass had grown over that distance of gravel)
- 2'11" from center white line to right front tire

A vehicle data base shows that the 2011 Ford Escape is 71.1 inches wide. The measurements listed above show that there was enough room to safely park a 2011 Ford Escape to the left of the yellow line.

ADDITIONAL FACTORS IN CRASH

Several additional factors must be considered to analyze this crash, some of those are

- Hours of darkness reducing visibility
- Wet roadways producing glare and reduced visibility
- Headlamps and other lights that may alter distances at which drivers can see and detect persons or objects
- Tall grass in median



FIGURE #10

Figure #10 is a scene photograph (facing south) which was taken at approximately 5:48am on the date of the crash. Just below the white (with green stripe) arrow in the photograph is a vehicle involved in an earlier crash (for which Kayla Davis had stopped her vehicle to render aid). The headlamps of that vehicle were on and facing at southbound traffic. Just below the white (with red stripe) arrow is the Ford Escape that Kayla Davis had parked. Just above the solid white arrow is the path which the Dodge Ram took during the crash sequence.



FIGURE #11

Figure #11 is a scene photograph (facing south) which was taken at approximately 6:02am on the date of the crash. Just below the white (with green stripe) arrow in the photograph is a vehicle involved in an earlier crash (for which Kayla Davis had stopped her vehicle to render aid). The grass and weeds in the median appear to be approximately 2 feet tall. Just below the white (with red stripe) arrow is the Ford Escape that Kayla Davis had parked. Just above the solid white arrow is the path which the Dodge Ram took during the crash sequence.

PERCEPTION, REACTION AND BRAKING FOR DODGE RAM

Sergeant Walston and I calculated perception, reaction and braking times/distances for the Dodge Ram, using the points and distances recorded from the robotic total station. Using a 1.5 perception/reaction time, the Ram would have needed to be at least 143 feet away from the Ford Escape for Kelm (driver of Ram) to have enough time to perceive and react to the Ford Escape parked in the lane of traffic. Under normal circumstances (good weather, good roads, vehicle in good mechanical shape, etc.) the minimum braking distance for the Ram (after the driver perceived and reacted to the danger) would have been 234.7222 feet. The minimum total distance (perception, reaction and braking) the Ram would have needed to stop before striking the Ford Escape was 377.7222 feet. The first visible tire markings on US 151 left by the Ram were approximately 53 feet north from the rear of the Ford Escape.

SCENE DOCUMENTATION



FIGURE #12

FORENSIC MAPPING

While at the crash scene, Detective Ted Sullivan and I used a robotic Leica Laser Total Station to document the roadway and other surfaces in the area of the crash scene. A Laser Total Station is an electronic instrument composed of three primary components. The unit contains a theodolite (angle measuring system), an EDM (electronic distance measuring system) and a data collector (electronic memory). The two measuring systems allow the user to collect accurate three-dimensional data points. The measurements are stored in the unit's data collector, along with descriptive tags, until the data can be downloaded into a computer system for further processing. A prism (reflector), usually mounted to a pole, is used to mark evidentiary points so that their placement can be measured by the instrument.

DIAGRAM GENERATION

Sergeant Walston later completed a post-collision scale diagram of the scene utilizing CAD Zone (Crash Zone version 12) professional drawing software. The two dimensional diagram positioned the evidence documented during the on-scene investigation along with the roadway and other land marks.

SCENE PHOTOGRAPHS

Using my department issued Sony digital camera, I photographed the following:

- Exterior of the 2011 Ford Escape
- Exterior of the 1999 Dodge Ram
- Interior of the 2011 Ford Escape
- Interior of the 1999 Dodge Ram
- Roadway (to include signs and road markings)
- Markings on the roadway relevant to this crash

INJURIES

The driver and passenger in the Dodge Ram were not injured in this crash. Kayla Davis was pronounced dead at the scene by the Dodge County Medical Examiner at 7:35am 08-17-2017. The Medical Examiner transported Davis to the Milwaukee County Medical Examiner's Office for autopsy, which occurred at 8:15am 08-18-2017. The final autopsy protocol documented the exact injuries Davis sustained, some of which were:

- Blunt force injury to the head with multiple skull fractures, lacerations, contusions and hemorrhages
- Blunt force injury to torso with bilateral rib fractures. Lacerations of aorta, lungs, liver, spleen and left kidney.
- Blunt force injury to extremities including lacerations and contusions. Fractures to the left femur, tibia and fibula.

The toxicology report revealed the presence of caffeine and confirmed there was no alcohol or other drugs present.

WITNESS STATEMENTS

INTERVIEW OF THERESA CASEY:

Casey said that she was headed south of US 151 heading to work in Columbus. Theresa said she could see another vehicle in the other (northbound) lane that had hit some water and hydroplaned. Theresa said the first vehicle went into the ditch and looked like it was going to come up out the ditch so she slowed down and pulled over, because she thought that it (the vehicle) was going to go in front of her. Theresa said she was pulled over into the gravel and someone a crossed the road (northbound side) stopped and then someone (Kayla Davis) behind her stopped. I asked Theresa if the vehicle was pulled over like hers or someplace else in the roadway. Theresa said she looked back to see but couldn't really make anything out because of the headlights. Theresa said that the flashers on the vehicle behind her were on. Theresa said Kayla was getting out of her vehicle and talking (rendering aid) to one of the driver's involved in the first crash. Theresa said she called 911, but her phone was connected via Bluetooth to her vehicle so when she began to

walk away from her vehicle the dispatcher could no longer hear her. Theresa said she was talking to Kayla to see if the guy she was talking to was ok. Theresa said the driver of the car near Kayla was bending over and was in shock, but was ok. Theresa said the guy who was pulled over in the northbound lanes was yelling "is everyone ok, and is anyone calling 911." Theresa said everything happened so fast, but she was looking back and forth at Kayla. Theresa said "all I could remember was it looked like a sign flying there the air." Theresa said then something came past her "whoosh" and she heard a thump. Theresa said when she heard the thump she didn't think it was a person. Theresa said "I didn't see her get hit, but I heard it." Theresa said "I was still on 911 so the sound should be on there." (It should be noted that listening to Theresa's 911 call you can hear Kayla being struck.) Theresa said the guy a crossed the street that stopped to help said "oh my god I thinks he hit that women." Theresa said she didn't realize Kayla had been struck until she turned around and looked and "she was gone." I asked Theresa "you didn't realize she had been struck until that guy said something?" Theresa said "no" she didn't realize Kayla had been struck. Theresa said that the guy that hit Kayla was pacing in the road and his girlfriend ran back and said "is she ok, is she ok, please don't let her die." Theresa said that she was yelling to Kayla when she was talking to her and that Kayla had been standing in the grass on the median. Theresa said "Kayla was standing in the grass and the grass was pretty high, and Kayla was just yelling down to the guy that was in the ditch." Theresa said she heard a thud but thought that Kelm hit the back of Kayla's vehicle. Theresa said that when she jumped back into her seat she was worried someone else was going to do the same thing that Kelm had done. Theresa said she closed her door and put her seatbelt on because she was afraid of being struck. Theresa said one of the guys in the ditch was unable to get out of his driver's door so he had to get out of his passenger side door. Theresa said she remembers him saying "Oh my god if I would have gotten out of my car on this side (drivers side) I would be dead." . I asked Theresa about the weather that morning and she said "it was raining." Theresa said "I didn't think it was raining hard but it was drizzling, dark cloudy, I didn't think it was foggy or anything." Theresa said it wasn't slippery on her side, but she was not sure if the cars on the other side hit a puddle or if there was standing water.

INTERVIEW OF NATHAN LYMAN:

Nathan said he was coming home from work driving in the northbound lanes. Nathan said he set his cruise at 65 mph and stays in the slow lane and takes his time getting home. Nathan said there was a white car that passed him in the fast lane, which he estimated was going 10-15 mph over the speed limit, as it passed him. Nathan said when the vehicle got a ways ahead of him he saw the taillights of the vehicle swerve, almost like making a U-turn in one of the crossovers on US 151. Nathan said it didn't look right and when he got closer he could see two sets of tail lights in the median. Nathan said he pulled over (on the north bound side of US 151) and turned on his flashers. Nathan said by the time he was doing that (checking for injuries) two other SUV's stopped on the other side (south bound). Nathan said "the driver of the red car that he (driver of the white car) hit was a little more disoriented and shook up." Nathan said there were two SUV's parked on the other (south bound) side of the road with their flashers on. Nathan said he ran up to that

women (Kayla Davis) and told her what he saw. Nathan said Kayla was standing on the edge of the road kind of into the median. I asked Nathan if the vehicle was in the lane of traffic or pulled off the road. Nathan said he didn't realize it until after Kayla had been hit, but her vehicle was parked in the lane of traffic. Nathan said "at the time I didn't realize that or I would have told her to move it myself." Nathan said he walked down by Engelhardt and told him he needed to sit down. Nathan said when he did that he felt this rush of air and heard this god awful noise. Nathan said the noise he heard was a crunching and tumbling noise like he's never heard before. Nathan said when he turned and looked to his right he could see a blueish truck coming to a stop in the ditch up a ways. Nathan realized "aw did she just get hit" and ran up to Kayla's vehicle and looked inside, and she wasn't there, so he went to the front of the vehicle and that is when he realized the vehicle was parked in the middle of the fast lane. Nathan said he took off running back into the ditch and when he found her (Kayla's body), she was lying with her feet facing the west and her head was facing towards the east. Nathan took into account that she might have a head or neck injury and turned her head so that her nose was above the water. Nathan said the driver of the white car came running over and the lady (Theresa Casey) from the red SUV started yelling does she have a pulse. Nathan said while he was talking to the driver of the red car (Engelhardt) his back was turned toward the south bound lanes of US 151. Nathan said he felt the gust of air and when he turned around he could see the tire tracks in the grass inches away from him. I asked Nathan if the driver of the truck that hit Kayla try to flee or run at any time during the crash. Nathan said no not at all, and that there was a lady with him that came running over yelling "is she ok, is she ok." Nathan said "he (Kelm) kept his cool and right away got on the phone and started calling the cops." Nathan said the roads were a little damp because it had rained that night. Nathan said by the time the crash happened it was not raining anymore, but Nathan said "the ditches were full of water, and when I was running through the ditch my legs were soaked and my shoes were soaked when I got home." Nathan said he just remembered that when he got off of work it wasn't raining anymore but the roads were slightly wet. Nathan said he got off work at around 5 am (the crash occurred at 5:16 am) and works in Fall River. Nathan said there were no major puddles on the roadway, but the roads were wet enough you could spin your tires.

INTERVIEW OF DAVID ENGLEHARDT:

David said he was headed northbound on USHY 151 on his way to work in Horicon. David said he could see a set of headlights coming up really fast from behind him. David said "this guy (Tyler Brieze) was booking." David said the vehicle came up from behind him "at a high rate of speed, like I was standing still." David said he had his cruise control on his car set at 67 mph (speed limit is 65 mph). David said he then sees the headlight swerve, "like disappear" and then seen them going towards his driver's side door. David said the vehicle spun striking his driver side door and then hit his vehicle again in the driver side rear. David said this caused both vehicles to spin out and go into the ditch. David said because of the damage to the driver's side of his vehicle he had to climb out the passenger side door. I asked David why he thought Tyler had lost control and David said because of the speed. David said "there's no way he could have controlled that car

at that speed.” David said that he had been talking with Kayla’s brother Jason, who told him everyone was saying that it was raining during the crash that killed Kayla. David said it was not raining during that crash because if it was he would have not gotten out of his car. David said “it was clearing up; it was not raining at the time of the accident.” David said when he looked at the south bound lanes he could see that there was one red in color SUV and then Kayla’s vehicle parked on US 151. David said that both of the vehicles were almost off the roadway, where the driver side tires were touching the grass so they weren’t all the way on the road. David said the headlights and flashers of all the vehicles that stopped were on. David said there was a small truck stopped north bound and then a red SUV stopped in front of Kayla’s vehicle going south bound. I asked David where his vehicle came to rest when it was in the median and he said it was right in line with Kayla’s vehicle. I asked David if he was talking with Kayla and he said “all she really said was calm down help is on the way.” David said after Kayla told both of the driver’s in the median to calm down, he (David) decided to have a cigarette and so he started walking back to his car, because he was going to sit on the trunk and smoke. David said before he could even take two steps he could hear a truck “baling.” David said he was looking up at the road and could see a truck coming. David said he took two steps towards his car and then “bang” and when he looked back Kayla was gone. David said “that truck was close to me I could feel the air going past.” David said when he heard the bang he thought that the truck had hit the red SUV that was parked in front of Kayla’s vehicle. David said that he was standing there smoking a cigarette and 3 guys came up to him (David explained to me it was Nathan, Tyler and Brittney) and asked him if he knew CPR because Kayla had been hit. David said “I was wondering where she went?” David said the red SUV was parked more off the road then Kayla’s car was. David said that he never went down by Kayla’s body, he said he only went as far as Tyler’s vehicle. David said that Tyler and Nathan both went after Kelm because he started to walk south bound away from the scene. David said Tyler was yelling at Kelm “Hey you need to come back, come back, come back.” David said Kelm came back, however was really distant and wanted to stay away from everyone. David said Kelm wouldn’t really talk to anybody. David said “he stayed away like he was hiding something, you could tell he was hiding something.” I asked David if Kelm got on the phone and called anyone and David said no he kept his distance. I asked David if Brittney was on the phone and David said no. David said neither one of them got on the phone to call 911 (We have a 911 recording from Kelm). David told me that he didn’t see the truck that hit Kayla until it was in the median. I asked David what attracted his attention to the truck and he said it was the headlights getting brighter as they were coming at him. David said that he turned around after Kayla had been struck, and said there were no other cars in the other lane. David said “it was bright, there was no way you could have missed it. You would have seen that from far away.” David said when he turned and looked south on USHY 151 he didn’t see any tail lights from any other vehicles. David said the next vehicle that came through the area was about 20 secs after Kayla had been hit. . David said it was not raining when the crash happened but it had been raining earlier that night. David said the roads were “not that bad” and said they were just damp. David said that when Kelm’s vehicle hit the median it had to be doing approximately 65 to 70 mph. David said “he had to be doing the speed limit or a little over that.” David said he told Jason Hutter that he

didn't know why Kelm didn't go into the other lane because he didn't see another vehicle in the other lane. David said "he could have took out all of us." David told me he sent detailed messages of what he witnessed to Jason Hutter.

INTERVIEW OF TYLER BRIESE:

Tyler said that he had been in the process of moving to Madison from Green Lake, Wisconsin. Tyler said he was on his way to Green Lake to get the last load of his stuff. Tyler said he was headed north bound on Ushy 151 going about 70 mph. Tyler said while he was driving on Ushy 151 it was significantly raining. I asked Tyler how hard it had been raining and Tyler told me that he was not good at being able to judge that. Tyler said that it was raining hard enough that there was standing water on the roadway and in the median. Tyler said the easiest way to have him explain how hard it was raining was to say that it wasn't optimal conditions to be driving. Tyler said that it was enough water to cause his vehicle to hydroplane, which caused him to lose control. Tyler said they were in the median working out their insurance information. Tyler said that when Kayla stopped she stopped in the fast lane and didn't have her headlights or hazard lights on. Tyler told me that from what he could remember he thought that Kelm was driving in the fast lane at approximately 70 to 75 mph. Tyler said that Kelm narrowly avoided rear-ending the (Kayla's) vehicle. Tyler said he didn't think that Kelm could see them standing in the median. Tyler said that Kayla had just got out of her car and had walked down by him. Tyler said Kayla was standing about 3 to 4 feet from him. Tyler said that he couldn't remember what Kayla was saying but that she was just trying to make sure that he was ok. Tyler said that is when Kelm's vehicle came through the ditch and struck Kayla. Tyler said that at first he was not aware that she had been struck. Tyler said "I was already in one accident and now this truck comes within inches of hitting me." Tyler said that the truck was so close to his that he could remember being pushed back up against his vehicle, but he was not sure if it was from instinct or from the velocity of the truck going past him. Tyler said that Kelm's vehicle ended pretty far down from where Kayla had been struck. Tyler said he heard one of them say "Oh my god I think we hit that fuckin' lady." Tyler said that made him realize what happened and so he started running down towards Kelm's vehicle. Tyler said that he found Kayla lying in the ditch three quarters of the way under water. Tyler said he checked to see if she had water in her lungs and then started doing chest compressions and mouth to mouth. Tyler said that Kelm and his passenger came down by him and he could see that they were absolutely hysterical. Tyler said he knows that everyone had some blame in the crash, "but is sure the family wants to blame just one person." Tyler said "if I would have never got into an accident, then she (Kayla) would have never had to come out to help me, if she wouldn't have parked in the fast lane without her lights on, or maybe had her hazards maybe he (Kelm) would have been able to see and avoid it, if he wouldn't have pulled down into the median she would still be here." I asked if Tyler spoke with Kelm at all and Tyler said yes he did. Tyler said he was telling Kelm to call 911 while he was doing CPR. I asked Tyler if Kelm tried to take off from the scene and Tyler said no they stayed on scene. Tyler told me again that during the whole incident Kelm and his passenger were hysterical and said he could see in their faces that they were trying to process it. Tyler said that he is not sure

if anyone would have been able to do anything different in this situation, regardless of whether they were under the influence or not.

WRITTEN STATEMENT FROM BRITTNEY ODUM

While on the scene Sheriff's Deputies were able to collect a statement from Kelm's passenger in the vehicle. In the statement that was written out by Brittney D. Odum, (f/w 10-21-1990), she says that she was a passenger in the Dodge Ram and Troy Kelm was the driver. They were traveling south on US 151 in the left/inside traffic lane and were going about 60 mph when they saw an SUV parked in the middle of the road. She said Troy tried to swerve so that he would not strike the SUV, swerving into the ditch where two more cars were parked so he swerved to try and avoid them. Brittney said that is when their truck struck Davis.

VIDEO RECORDINGS

I checked the area around the crash scene for any Video Recordings of the crash, however due to the remote location of this crash scene there were no buildings with video recording devices that would have captured the crash.

INVESTIGATIVE CONCLUSIONS

The following statements contain conclusions and opinions that are based on the materials used in this report. Any new information that becomes available will have to be addressed as to its affect, if any, it may have on these conclusions. The opinions are based on my training and experience as a Traffic Crash Reconstructionist and are accurate to a reasonable degree of scientific certainty.

- The portion of US 151 where the crash occurred was traveled Concrete and was in good condition. The surface was wet with water on the roadway at the time of the crash.
- This section of US 151 is posted at 65 mph.
- On the date and time of the crash, visibility was reduced by the wet roadway, hours of darkness, and glare from lighting from other vehicles.
- Tyler Briese told deputies that his vehicle hydroplaned due to water on US 151 which caused him to lose control of his vehicle causing the first crash.

- NEXRAD Doppler Radar shows a line of strong rain moving north west at 5:10 am on the day of the crash. (The crash occurs at 5:16 am.)
- ICOP dashcam video recorder from the squad Dodge County Sheriff's Deputy Ryan Jackson was driving on US 151 as he was responding to the crash scene at approximately 5:34am. Water and glare from the wet roadway and lights from other vehicles can be seen in this snapshot.
- The headlights from Briese's vehicle were pointing in a northerly direction towards the south bound lanes, creating additional lighting and glare for the drivers of southbound vehicles.
- The Ford Escape was parked/unattended in the left/ inside traffic lane of US 151.
- Kayla Davis exited her vehicle (Ford Escape) to render aid to the drivers from the first crash.
- The Ford Escape was 2'11" from the white hash line indicating the center of the roadway.
- The Ford Escape was 3'1" from the yellow solid line indicating the left side of the lane of travel.
- A 2011 Ford Escape had the width dimensions of 71.1 (5'11") inches wide.
- The Ford Escape was 7'10" from the yellow solid line to the grass edge.
- Kelm said he was following a vehicle south bound on US 151 when that vehicle switched lanes, moving from the left/ inside lane to the right/ outside lane. There is no evidence or statements which show that vehicle was non-existent.
- Kelm said when the vehicle in front of him switched lanes it revealed Kayla's vehicle parked in the left/ inside lane.
- Kelm was left with the choice of taking evasive action by swerving to the right (where Kelm said other traffic was present) of the Ford Escape and possibly striking the other traffic present, or swerving to the left of the Ford Escape and going in between the other parked vehicles in the median.
- Kelm said when he entered the ditch he saw the two vehicles from the original crash and turned back towards the roadway.
- Kelm said he saw a red SUV (Theresa Casey's vehicle) which prevented him from making his way back onto the roadway.

- Using a 1.5 perception/reaction time, the Ram would have needed to be at least 143 feet away from the Ford Escape for Kelm (driver of Ram) to have enough time to perceive and react to the Ford Escape parked in the lane of traffic.
- Under normal circumstances (good weather, good roads, vehicle in good mechanical shape, etc.) the minimum braking distance for the Ram (after the driver perceived and reacted to the danger) would have been 234.7222 feet.
- The minimum total distance (perception, reaction and braking) the Ram would have needed to stop before striking the Ford Escape was 377.7222 feet.
- The first visible tire markings on US 151 left by the Ram were approximately 53 feet north from the rear of the Ford Escape.
- Sergeant Walston and Detective Sullivan used a speed formula (using AR Pro mathematical software) which showed the speed of the Dodge to be approximately 64.39mph at the start of the tire mark.
- There is no evidence to support that Kelm could see the Ford Escape any sooner than when he perceived, reacted and began to brake his vehicle (as shown by the tire markings on the roadway).
- Both Lyman and Englehardt said they had set their cruise control at 65 mph and 67 mph respectively.
- The two medications present in Kelm's blood (as determined by the Wisconsin State Hygiene Lab) were identified as Alprazolam (Xanax) in the quantity of 30 ng/mL and Clonazepam (Klonopin) in the quantity of 23 ng/mL.



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October 8, 2018

Kurt F. Klomberg
District Attorney
210 W. Center Street
Juneau, WI 53039

RE: Dodge County Crash Investigation (DCSO 17-20124)

Dear DA Klomberg:

At the request of your office, the Wisconsin State Patrol Technical Reconstruction Unit reviewed the submitted case file related to a fatal motor vehicle collision that occurred on August 17, 2017. The following statements are based on the information and evidence reviewed:

- The lighting conditions were dark and no artificial light was present at time of the collisions. The emergency call was received by the Dodge County Communications Center prior to the start of civil twilight.
- There were adverse weather conditions around the time of the collisions. The roadway was wet and the conditions were likely misty around the time of the crash. Deputy Wolfe reported that the roads were wet and that he had to use his windshield wipers as he responded to the crash scene. Theresa Casey (witness) stated that it was drizzling. Nathan Lyman (witness) noted that the roadway was wet enough that you could spin your tires. Video footage from responding squad cars shows intermediate misting weather conditions and windshield wipers being utilized.
- A collision occurred in the northbound lanes of USH-151, between a 2003 Toyota Corolla and a 2017 Chevrolet Cruze. Both involved vehicles came to rest in the median. This initial crash precipitated a secondary collision that resulted in the death of Kayla Davis.
- Kayla Davis, the operator of a 2011 Ford Escape, parked in the southbound left traffic lane, and walked into the median to render aid. Witness Nathan Lyman indicated he observed the Ford parked in the traffic lane. Both Theresa Casey and Nathan Lyman stated the Ford's emergency hazard lights were activated. The Sheriff's Department documented this parked position.

A vehicle stopped in the lane of traffic does create a potential hazard to other motorists. The perception and response to a stopped vehicle, facing the same direction as traffic approaching from the rear, is much more complicated than simply having a line of site. When perceiving and responding to a hazard, the perception of a hazard is something more than just vision. Perception also has to include categorization such as hazardous or not hazardous. Without clear contextual clues, an approaching motorist may not realize a vehicle ahead is stopped. Contextual clues would be such things as landmarks, curves in the roadway, and changes in

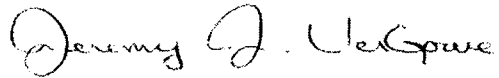
elevation which make it easier to see that a vehicle is not moving within the environment. Without the contextual clues, an approaching motorist will not realize that they are closing in on an object until a certain visual expansion threshold is met. Visual expansion is the rate at which an object becomes bigger and bigger in a person's field of view as they get closer to the object. This concept would be similar to an artist drawing an object bigger or smaller depending on how far away they want the object to appear to the viewer. In addition, the vehicle would not be an immediate hazard until the approaching driver realizes that the vehicle is in their path of travel. The operator of the Ford parked in the southbound lane of traffic, violating the normal expectancy of motorists. As a result, a situation was created in which an approaching motorist had to perceive and react to the immediate hazard.

- The physical evidence suggests that the operator of the 1999 Dodge Ram pickup, Troy Kelm, reacted to the stopped Ford. The initial tire mark evidence indicates that he steered left, braked, traveled into the median and struck the pedestrian. The pedestrian, Kayla Davis, sustained fatal injuries as a result of this collision.
- The available physical evidence suggests the pickup truck was traveling at a speed proximate to the speed limit.
- The operator of the Dodge's reaction to the stopped Ford was to steer left. With the benefit of hindsight, it can be concluded that the driver's reaction led to an undesirable result. It would be difficult to draw any conclusions regarding the appropriateness of the driver's response for several reasons. Dark lighting conditions, wet weather conditions, and potential headlamp glare could have complicated the driver's perception of the stopped vehicle and ultimately his response to it. The exact conditions that may have existed at the time of the collision would be difficult to replicate. In addition, Mr. Kelm stated he observed the stopped Ford after a car in front of him changed lanes. There is no factual evidence to confirm or refute the existence of a lead vehicle, or its distance from the Ford when it changed lanes.
- David Englehardt was the only witness that had a detailed recollection of traffic conditions at the time of the crash. He stated that he didn't see any other vehicles around the time that the Dodge Ram struck the pedestrian. He also stated that the next vehicle that came through the area was 20 seconds after Kayla Davis was struck.
- Observations made by other witnesses at the scene would seem to question Englehardt's ability to make and remember detailed observations about the traffic conditions at the time of the crash. Theresa Casey stated that the driver of the car near Kayla was bending over and was in shock. Nathan Lyman described the driver of the red car as being disoriented and shook up. Lyman also stated that Kayla had pointed to the driver of the red car and stated, "He needs to sit down." Lyman stated that he was making sure the guy from the red car wasn't going to fall over when he heard the collision.
- David Englehardt stated that Kayla's vehicle was pulled off onto the gravel part of the roadway. He indicated that not much of her vehicle could have been in the traveled portion of the roadway. These observations are not consistent with the documented physical evidence.
- The Wisconsin Crime Lab detected the presence of Methadone, Alprazolam, and Clonazepam in Mr. Kelm's blood. The affects that these drugs may have had on his ability to safely operate a motor vehicle at the levels detected would need to be assessed by a qualified expert. Mr. Kelm was subsequently tried for operating a motor vehicle while intoxicated relative to his operation at the time of this incident. He was found not guilty by a jury.

Sincerely,

A handwritten signature in cursive script that reads "Peter M. Moe".

Peter M. Moe
WSP Technical Reconstruction Unit
Accredited Crash Reconstructionist ACTAR #2709

A handwritten signature in cursive script that reads "Jeremy J. VerGowe".

Jeremy VerGowe
WSP Technical Reconstruction Unit
Accredited Crash Reconstructionist ACTAR #1509



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

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January 7, 2019

Kurt Klomberg
District Attorney
Dodge County Justice Facility
210 West Center Street
Juneau, WI 53039

Re: Dodge County Fatal Crash involving Troy R. Kelm
Law Enforcement Complaint #17-20124

Dear District Attorney Klomberg:

In the fall of 2018, you requested that I review an investigation of a crash that resulted in the death of Ms. Kayla Davis on August 17, 2017. Ms. Davis died after being struck by a vehicle driven by Troy Kelm. Specifically, you requested that I conduct an independent assessment of the investigation of this crash to determine if I believed, based on my training and experience, that criminal charges were warranted against Troy Kelm. I agreed to conduct an independent review of all of evidence to determine whether the facts surrounding the crash supported charging Mr. Kelm with either homicide by intoxicated use of a vehicle in violation of Wis. Stat. § 940.09, or homicide by negligent operation of a vehicle in violation of Wis. Stat. § 940.10.

In order to complete this assignment I reviewed all of the documents, materials, and media files generated by the investigation of this crash. These materials, provided by the Dodge County District Attorney's office, included hundreds of pages of police reports, witness interviews and statements, squad videos, scene photos, and the reconstruction reports created by the Dodge County Sheriff's Department and the Wisconsin State Patrol. Also included were the simulation video created by the Wisconsin State Patrol and the toxicology report for Troy Kelm. Finally, I also reviewed your No Prosecution Memorandum in this matter, as well as the applicable statutes and jury instructions for the above mentioned offenses.

You asked me to review this case because I am one of the state's two dedicated Traffic Safety Resource Prosecutors who specializes in the prosecution of vehicular crimes. The Traffic Safety Resource Prosecutor Positions are funded by the Wisconsin Department of Transportation, but are housed in the Department of Justice. As an assistant attorney general in the Wisconsin

Kurt Klomberg
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Department of Justice's Criminal Litigation Unit, I am assigned to handle exclusively vehicular crimes. The majority of the cases I handle are vehicular homicides or felony level injury cases. As a resource prosecutor, I am also responsible for providing training and technical assistance to law enforcement and prosecutors throughout the state on impaired driving cases and vehicular crimes. In addition to providing training in Wisconsin, I also frequently give presentations at the national level.

In my position as a Traffic Safety Resource Prosecutor, I also serve as an advisor and mentor to the state prosecutors, providing guidance on charging decisions, trial issues, and sentencing strategies in serious vehicular cases. I am commonly asked to assist local prosecutors in vehicular homicide trials. In my 20 year career, I have tried multiple complex vehicular homicide cases and consulted on hundreds more.

Based upon my independent review and assessment of this case, and my extensive training and experience, I do not believe that the evidence supports the issuance of criminal charges in this matter. I have thoroughly reviewed the No Prosecution Memorandum you prepared, and I concur with your legal analysis and ultimate conclusion. While the death of Ms. Davis is tragic, I do not believe that the State could prove either of the vehicular homicide charges - homicide by intoxicated use of a vehicle in violation of Wis. Stat. § 940.09, or homicide by negligent operation of a vehicle in violation of Wis. Stat. § 940.10 - beyond a reasonable doubt. As such, it is my opinion that no criminal charges should be filed against Troy Kelm.

Sincerely,

A handwritten signature in cursive script, reading "Tara M. Jenswold".

Tara Jenswold
Assistant Attorney General
Traffic Safety Resource Prosecutor

TJ:jjn